

PUBLICATION

Blowing Smoke: New Cannabis Law and Implications for Condominiums

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December 1, 2017

The new cannabis legislation in Canada will come into effect on July 1, 2018. As part of this law, not only will possession and consumption be legal but individuals will be allowed to grow up to four plants in their personal residence.

There have been questions raised within the condominium industry as to the implications the new legislation will have on condominiums. The new legislation raises concern as to whether challenges could arise under the Alberta *Human Rights Act* for condominiums that have Bylaws preventing people from smoking marijuana in their units.

The first question to ask is: *Why is this an issue?*

The issue with marijuana in condominiums is not the effects of the drug per se, but the smoke and smell associated with it. It causes a nuisance to other owners. Marijuana grow operations pose similar problems. As I have heard from "sources", plants can create a significant odour when they are budding. Lastly, cultivators often create a hot and humid environment to encourage fast growth, leading to concern of mold development and increased utility bills.

Despite these concerns, we don't anticipate Condominium Corporations will have serious issues. Here are the reasons why.

To prevent growing and smoking of marijuana in a unit, Condominium Corporations will no longer be able to rely on the prohibition found in most Bylaws against doing something illegal in a unit but there are other Bylaw provisions that can be relied upon.

Many Condominium Bylaws prohibit individuals from smoking in their units or on common property. This applies to marijuana in the same way it does, tobacco. For condominiums with a smoking prohibition that want to prohibit tobacco but allow marijuana, or vice versa, would have to have their Bylaws amended to reflect this. For all other condominiums, it is open to them to prohibit smoking entirely.

The other concern is the possibility of growing marijuana plants within a unit, once legal to do so. Our first recommendation is to amend the Bylaws to prohibit unit owners from growing marijuana plants. Our Condominium Law Group includes a provision in Bylaws that prohibits the growing of marijuana plants.

However, even Bylaws that do not have this provision have other sections which can be relied upon. The most applicable provision is the prohibition commonly found in Bylaws against an occupant doing anything which would void the insurance of the Corporation or increase premiums. It is common language in condominium insurance policies that coverage is void if you have a grow operation, and there is no reason to believe this will change with the passing of the new law. Hence Corporations will still be able to use this provision to stop residents from growing marijuana plants.

The other issue that is often raised is that of Human Rights. The use of marijuana to treat medical conditions is on the rise and will continue to increase once recreational use is legalized. As such, an attempt by a Condominium Corporation to stop a resident from smoking marijuana could be challenged under the *Human Rights Act* as discrimination on the grounds of disability.

Medicinal marijuana has been used for quite some time, but as far as I am aware there have been no cases in which the right of the resident to smoke marijuana in their unit has been brought before the Courts. When and if a challenge is brought, it is doubtful that that a Human Rights Tribunal would force the condominium corporation to allow smoking in the unit.

The first reason is that there is no compelling reason why a resident who requires marijuana for medical purposes cannot smoke off premises. A case was brought by an individual in British Columbia relating to tobacco smoking. In this case, the occupant brought a Human Rights complaint against the enforcement of a Bylaw prohibiting smoking. She argued that she was being discriminated against as an addicted smoker (addiction is considered a disability). The decision, upheld by the Court, was that there was no discrimination because there was nothing stopping the owner from smoking outside her unit in the designated areas. A similar reasoning could apply to marijuana smoking.

Secondly, and more significantly, we now have the advent of vaping devices wherein marijuana products are consumed resulting in much less combustion and hence, a negligible amount of smoke and smell. There are also a number of edible projects available. Hence if a Condominium Corporation makes it clear that they are willing to allow an occupant to consume marijuana in this way, a Tribunal would likely find that not only can a unit owner consume marijuana, but they can also consume it in any manner they choose, despite a completely satisfactory alternative does not create a nuisance to other occupants.

If a challenge is brought to court for growing plants under the Alberta *Human Rights Act*, it is unlikely that a Tribunal or Court would find that the occupant suffered undue hardship because they were compelled to buy their product from a dispensary rather than grow it themselves.

In summary, although it is difficult to predict what sort of growing pains society and condominiums, in particular, might have as a result of the changes in the law, I do not think it presents any significant legal difficulties for condominium owners and their Boards. Boards would be prudent to examine the Bylaws and make sure that they properly reflect the choices of the community now that the prohibition against doing anything illegal in one unit will not apply to smoking or growing marijuana. If an issue does arise, Boards should feel confident in enforcing their “no smoking” Bylaws, and if challenged under Human Rights, Boards should propose edibles and vaping as alternate modes of consumption.